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January 25, 1993

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Ms. Donna R. Searcy
Secretary
Federal Communications Commission
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Re: Wilburn Industries, Inc.
BPH-911230MC
Channel 280A
Westerville, Ohio

Dear Ms. Searcy:

Enclosed for filing on behalf of Ohio Radio Associates, Inc. are an original and four (4) copies of its supplement to petition to deny and dismiss the application of Wilburn Industries, Inc.

Please contact the undersigned in our Washington, D.C. office.

Respectfully submitted,

MCNAIR LAW FIRM, P.A.

By:


Stephen T. Yelverton

Enclosure

B:SEARCY26.FCC

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FEDERAL COMMUNICATIONS COMMISSION

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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JAN 25 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In Re Application of:)
)
WILBURN INDUSTRIES, INC.)
)
)
Application for Construction)
Permit for a New FM station,)
Channel 280A, Westerville, Ohio)

File No. BPH-911230MC

To: Chief, Audio Services
Division

SUPPLEMENT TO PETITION TO DENY AND DISMISS THE APPLICATION
OF WILBURN INDUSTRIES, INC.

Ohio Radio Associates, Inc. ("ORA"), by its attorneys, pursuant to Sections 73.3584(a) and 73.3587 of the Commission's Rules, hereby submits this supplement to its petition to deny and dismiss the application of Wilburn Industries, Inc. ("Wilburn"). On March 26, 1992, ORA filed a petition to deny and dismiss the application of Wilburn. On July 29, 1992, ORA filed a supplement to its petition to report the release of a new Commission decision which is relevant to the issues raised by ORA. It is filing this supplement to report the release of another new Commission decision which is relevant to the issues raised in the petition. In support of its supplement, ORA submits the following comments.

In its March 26, 1992, petition to deny and dismiss, ORA contended that the application of Wilburn must be dismissed with prejudice because it proposes a short-spacing of 6.84 km. In a comparative hearing, a short-spaced application cannot be considered if other applicants propose fully-spaced and technically suitable tower sites. See, e.g., North Texas Media, Inc. v. FCC,

778 F.2d 28, 34 (D.C. Cir. 1985). ORA and one other applicant in this proceeding propose such acceptable tower sites and no party has contested their availability and suitability.

The applications in this proceeding were filed for a channel which was allocated years ago. The allotment is now vacant because the license was deleted as a result of denial of the renewal application. Wilburn and the other short-spaced applicants are proposing the use of the existing tower of the previous licensee. That station was short-spaced to Station WTTF-FM, Tiffin, Ohio, but was "grandfathered" under Section 73.213. On September 11, 1992, Station WTTF-FM also filed an informal objection to Wilburn's attempt to perpetuate the short-spacing caused by the now deleted station.

In opposing ORA's petition, Wilburn has contended that it is entitled to the same "grandfathering" rights under Section 73.213 as the previous licensee. According to Wilburn, not only existing stations, but vacant allotments are "grandfathered" under Section 73.213. See, Wilburn oppositions, filed April 9, April 14, and August 6, 1992.

In John M. Salov, FCC 92-565, para. 17, released January 8, 1993, the Commission directly addressed this issue. Therein, it held that Section 73.213 applies only to existing short-spaced stations. When an allotment becomes vacant, Section 73.213 is no longer relevant or applicable.

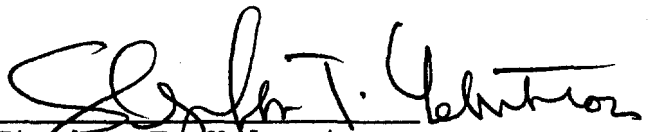
The Commission, at paras. 15-16, further held that it is established practice to remove vacant allotments which do not meet the minimum spacing requirements, whenever the opportunity arises. According to the Commission, short-spaced channels are inefficient and the public interest is best served by not allowing them.

However, the vacant Westerville allotment does not have to be deleted because fully-spaced and technically suitable tower sites exist and are available. The problem here is that Wilburn and other applicants insist on using an existing tower which is 6.84 km. short-spaced. Wilburn insists that this use is permissible because the previous Westerville licensee, with which it has no privity, was "grandfathered" under Section 73.213. However, in view of John M. Salov, that rationalization has no merit and must be rejected.

WHEREFORE, in view of the foregoing, the application of Wilburn is impermissibly short-spaced and must accordingly be dismissed with prejudice.

Respectfully submitted,

MCNAIR LAW FIRM, P.A.

By: 
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Tel. 202-659-3900

January 25, 1993
020979.00001 ORA.2

CERTIFICATE OF SERVICE

I, Stephen T. Yelverton, an attorney in the McNair Law Firm, P.A., do hereby certify that on this 25th day of January, 1993, I have caused to be hand-delivered or mailed, U.S. mail, postage prepaid, a copy of the foregoing "Supplement to Deny and Dismiss the Application of Wilburn Industries, Inc." to the following:

Dennis Williams, Chief*
FM Branch
Room 332
Federal Communications Commission
Washington, D.C. 20554

Eric S. Kravetz, Esquire
Brown, Finn & Nietert, Chartered
1920 N Street, N.W.
Suite 660
Washington, D.C. 20036


Stephen T. Yelverton

*Hand Delivery